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554202—43

In the Supreme Court of the United States

OCTOBER TERM 1943

No. 351

CLARENCE H. RAYNO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court (R. 13–14, 16–17) are not reported. The opinion of the Circuit Court of Appeals (R. 233–240) is reported in 136 F. 2d 376.

JURISDICTION

The judgment sought to be reviewed was entered on June 14, 1943 (R. 240). A petition for rehearing was denied July 6, 1943 (R. 241). A petition for a writ of certiorari was filed September 14, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States, when it condemns land to obtain borrow material for a public project, must compensate the landowner on the basis of the demand created by the Government.

STATUTES INVOLVED

The pertinent provisions of the Flood Control Act of June 22, 1936, 49 Stat. 1570, 1572, and the Flood Control Act of June 28, 1938, 52 Stat. 1215, 1216, are set out in the Appendix.

STATEMENT

On September 28, 1939, the United States, at the request of the Secretary of War, instituted proceedings to condemn 12.3 acres of land owned by the petitioner for use in connection with the Franklin Falls Dam, an earth dam in a flood control project in the Merrimack River Basin authorized by the Flood Control Acts of 1936 and 1938 (R. 2–8). The 12.3 acres were part of a 63-acre farm located on a highway about three miles from the Franklin Falls Dam (R. 34, 39), containing a deposit of some 270,000 cubic yards of glacial till.[1] They were taken for the purpose

[1] A glacial deposit (R. 87–88) of impervious quality (R. 67–68) also referred to in lay terms as hardpan and boulder clay (R. 84–85).

of obtaining "borrow" material for the impervious core and blanket of the dam (R. 68–69).

Commissioners appointed August 6, 1940, to determine just compensation for the taking (R. 9), filed a report January 10, 1941, awarding the owner $3,220.00 (R. 10–11). Both the United States and petitioner appealed and asked for a jury trial (R. 12). A trial *de novo* before a jury resulted in a verdict on September 18, 1941, of $7,250.00 (R. 12). Upon motion by the United States the trial court ordered a new trial unless the parties would agree to reduction of the verdict to $4,000.00 (R. 13–14). Petitioner excepted to the order (R. 14) and a second trial before a jury was had. This time the jury returned a verdict for $12,725.00 (R. 15). A motion by the United States for a new trial was denied and judgment entered on the verdict (R. 15–24).

The relevant facts as they appeared at the second trial may be summarized as follows: The 12.3 acres of land taken by the Government comprised about half the pasture land of a 63-acre dairy farm, the entire farm having been purchased for petitioner by his mother in 1928 for $1,400.00 (R. 33–34). Upon being reimbursed for the purchase price, she conveyed it to him in 1933 (R. 33–34, 48). During the years he and his mother owned the farm they expended approximately $1,000.00 on improvements, nothing being expended on that part of the farm devoted

to pasture (R. 35). One witness for petitioner testified that the entire farm was worth $2,500.00 to $2,700.00 for agricultural purposes prior to the taking and $1,200.00 to $1,300.00 after the taking of the 12.3 acres in question, making the total damages somewhere between $1,300.00 and $1,400.00 (R. 51, 65–66).

Over objection of the Government (R. 15, 98–99, 105, 122, 123, 141, 142) the remaining witnesses for the petitioner testified on the theory that the best use for which the property was adapted was as a borrow pit and that its value as a source of borrow was determined by the number of cubic yards of borrow used by the Government for the Franklin Falls Dam multiplied by the price generally paid for borrow—2¢ to 10¢ per cubic yard (R. 99, 104–105, 122, 141–142). Accordingly, on the assumption that the 12.3 acres contained 270,000 cubic yards of glacial till—the quantity removed by the Government for the dam—they testified that the property was worth $12,000.00 or $13,000.00 (R. 114), $13,500.00 (R. 123–124), and $10,000.00 to $12,000.00 (R. 142).

The evidence also showed that from 1936 to 1938 tests were made on petitioner's property and other locations to ascertain where suitable borrow material for the dam could be obtained (R. 77–79). The material on petitioner's farm was found to be most suitable (R. 79). The dam, as contemplated by the engineers' drawings, was

approved by Congress in the Flood Control Act of June 28, 1938 (52 Stat. 1215), Appendix, *infra* pp. 9–10. Specifications for the dam were issued, specifying that the borrow material would be taken from petitioner's farm (R. 71–72). Bids on this basis were received August 1, 1939 (R. 71), over a month prior to the institution of the present proceedings.

Other than for use in connection with the dam, the only evidence of any demand for glacial till was that some of this material from petitioner's farm and elsewhere had been used on three or four tennis courts (R. 43–44, 101–102, 119, 159, 164, 175) and in the construction of clay chloride roads, a cheap type of road for light traffic[2] (R. 44–45, 96–98, 103–104, 108, 145, 147–158, 163–165, 169, 171, 176). Cf. Pet. 3, 9. The latter use required 100 to 200 cubic yards of glacial till per mile (R. 100, 108) and not more than six or eight miles of road of this type had been constructed in the vicinity since 1920 (R. 97–98, 103–104, 108). Witnesses for petitioner admitted that deposits of glacial till were "very common" in the Merrimack Valley (R. 89–90) and that such deposits in areas adjacent to the Rayno farm would run into "millions of cubic yards" (R. 92; cf. R. 79–80, 88, 90).

[2] Petitioner's evidence showed that this material was an unsuitable material sometimes used for the subsurface of roads when nothing better was available (R. 127–130).

On appeal by the United States the court below reversed, remanding the case for a new trial on the ground that the market for hardpan created by the Government's activities at Franklin Falls should not be considered in determining the value of the land from which it was taken (R. 237). The court held that the instructions given the jury were erroneous because from them "the jury might well have concluded that the Government ought to pay for the land on the basis of some price per yard for the amount of hardpan taken from it * * *." (R. 240). The court further held error the refusal, properly excepted to, to give two instructions requested by the Government: *first,* that the landowner was not entitled to recover any element of value arising from the prospect that the land would be taken by the Government; *second,* that the presence of the glacial till could not be considered unless there was a demand for the material by someone other than the Government.

ARGUMENT

Review by this Court is not warranted. The decision below merely holds that a condemnation award cannot be sustained which is based on the peculiar value of the property to the taker.[3] It is thus wholly consistent with the principles re-

[3] The first of the instructions requested by the Government which the court below held should have been given, is merely

peatedly enunciated by this Court, in *United States* v. *Miller,* 317 U. S. 369, 375; *Olson* v. *United States,* 292 U. S. 246, 256; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 76, 80, and cases therein cited. The opinion specifically (R. 240) leaves open to petitioner on retrial the proof of whatever value as a borrow pit the property had before the likelihood of its designation by the Government as the borrow pit for that project which supplied the only substantial use for such borrow material ever known in the locality. The decisions on which petitioner relies for a conflict (principally *Olson* v. *United States,* 292 U. S. 246) merely hold that commercial adaptability for a use similar to the public project cannot be disregarded as an element of value; the decision below thus expressly follows that rule.

The award was clearly erroneous. As the Statement (*supra,* pp. 3–5) shows, petitioner was awarded $12,750 for one-fifth of a farm which was purchased in a high-price era for $1,400, and to which $1,000 in improvements had since been added. As a borrow pit the property could not possibly have been accorded such value on established principles of value in condemnation cases,

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an adaptation of this rule to the facts of the particular case. *Semble, United States* v. *Miller, infra.* As the Statement shows, here, as in the *Miller* case, from the time the Government was committed to the project there was a probability that petitioner's land would be taken.

because virtually the entire countryside was underlain with the same borrow material, and the highest possible prospective need, except for this dam, was a few hundred yards a year at 2¢ and 10¢ a yard.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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